

(2001) 04 DEL CK 0032

In the Delhi High Court

Case No : IA No. 9592/97 in Suit No. 1632/96

Mr. Lalit Kumar Sharma

APPELLANT

Vs

Mr. Kapil Kumar Sharma and Another

RESPONDENT

Date of Decision : 26-04-2001

Acts Referred:

Citation : (2001) 4 AD 949 : (2001) 91 DLT 522 : (2001) 59 DRJ 86

Hon'ble Judges : Jiwan Dass Kapoor, J

Bench : Single Bench

Advocate : Mr. Jagjit Singh Chhabr, for the Appellant; Mr. Kuljeet Rawal and Mr. M.A. Chinnaswamy, for the Respondent

Judgement

J.D. Kapoor, J.—This is an application under Order 6 Rule 17 seeking amendment in respect of para 13 of the plaint as to rectification of the factual error in respect of the order dated 13 May, 1997 passed by the learned Trial court before whom the earlier suit was filed by the plaintiff. Main objection raised by counsel for defendant No.1 is with regard to the maintainability of the suit itself as the same is barred by provision of Order 9 Rule 9 CPC

2. A suit for partition was filed by the plaintiff in the court of learned District Judge valuing the pecuniary jurisdiction below Rs. 5 lacs but when it came to the notice that pecuniary jurisdiction exceeded Rs. 5 lacs but when it came to the notice that pecuniary jurisdiction exceeded Rs. 5 lacs and Therefore the court of Additional District Judge has no jurisdiction to try the suit, an application under Order 23 Rule 1 CPC was moved by the plaintiff seeking withdrawal of the suit with the permission to file a fresh suit in the court of competent jurisdiction of the same cause of action.

3. The plaintiff throughout laboured under the belief that the application has been allowed and as such he filed the instant suit in this court wherein the following plea was taken in para 13 of the plaint:

That earlier the plaintiff filed suit for partition with regard to the same property

which was pending in the court of Shri Prithvi Raj, Additional District Judge, Delhi but the same was withdrawn on 13.5.96 with permission to file a fresh suit on the same cause of action as the pecuniary jurisdiction of the court to try and entertain the suit a valuation of the suit exceeds more than Rs. 5,00,000/-.

4. When the defendant in the written statement disclosed that the suit was in actuality dismissed in default and not dismissed as withdrawn with the permission to file a fresh suit for the same cause of action, the instant application was moved by the plaintiff. The order dated 13.5.97 passed by the learned District Judge which was not in the knowledge of the plaintiff is as under:

"13.5.97

Present: None for the plaintiff.

Counsel for the respondent No.2.

In this case application of compromise and permission to withdraw this petition was filed but today non for the plaintiff has appeared despite several calls made. Case is dismissed in default. File be consigned."

5. So far as the non maintainability of this suit because of its being barred by the provision or Order 9 Rule 9 CPC is concerned it is altogether an independent issue and has no relevance so far as the amendment in para 13 of the plaint sought through the application under Order 6 Rule 17 CPC is concerned. The principles governing the provision of Order 6 Rule 17 CPC are on different parameters and mainly confine to the nature of facts and the nature of amendment sought by a party. It is settled that an amendment that does not introduce a new case or new cause of action, it is liable to be allowed. Stage of the suit is immaterial. The amendment can be allowed even at the appeal stage of the suit is immaterial. The amendment can be allowed even at the appeal stage. The nature of the instant amendment is mere rectification of a factual error which was not to the knowledge of the plaintiff at the time of filing of the suit in question and as such does not introduce either a new case or a new cause of action.

6. It is also settled that even if the amendment ousts the jurisdiction of the court the same is liable to be allowed by the court whose jurisdiction is ousted. Disallowing such an amendment is not in accordance with the principles enshrined in Order 6 Rule 17.

7. Almost similar situation arose in the following cases : (i) Kanthal India Ltd. Vs. Anant Prasad Bhatia and Others, (ii) Suri Films Vs. S.N. Govinda Prabhu and Brother, . In Kanthal India's case the amendment of the plaint strengthened the case of the plaintiff by introducing certain pleadings to show that certain matters already pleaded took place within the jurisdiction of the court. It was held that such an amendment was to be allowed since, if the suit has to be tried then those pleadings would be necessary and would be relevant for the purpose of determination of the real controversy between the parties.

8. In *Suri Films* it was held that the court before which the case is pending alone is the court competent to deal with the amendment and in that process the merit of the claim and the question whether the effect will be ouster of jurisdiction are extraneous considerations which are not in consonance with the spirit of Order 6 Rule 17 CPC. However, in the said case the trial court before whom the case was pending did not allow the amendment application on the presumption that the amendment would oust its jurisdiction.

9. In the instant case the situation is altogether reverse. Here the plaintiff seeks the amendment of a factual error as to the jurisdiction of the court. Defendants say that the amendment application moved in the instant case was only maintainable before the trial court before whom the earlier suit was filed. It is not the actual legal position. The plaintiff had two options open before it. First option was to move the amendment application before the court the suit was filed pointing out the alleged actual valuation of the suit and after the same was allowed the said court should have sent the case to the court of competent jurisdiction. The second option was to move an application under Order 23 Rule 1 CPC which conferred power on the party to abandon his suit or abandon a part of his claim at any time after the institution of the suit and if the court is satisfied that there is sufficient ground for allowing the plaintiff to institute a fresh suit for the subject matter for a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject matter of such suit or such part of the claim. Such an application for withdrawal of the suit can be made at any stage of the proceedings including the appellate stage.

10. In view of the above, I find that the amendment sought by the plaintiff is merely a rectification of the factual error and that too of a fact which was not to the knowledge of the plaintiff as it was rightly presumed by the plaintiff that after moving the application under Order 23 Rule 1 CPC the suit had been dismissed as withdrawn with liberty to file a fresh suit on the same cause of action.

11. As a result the application is allowed.